

**KENTUCKY PERSONNEL BOARD
MINUTES OF JANUARY 11, 2019**

1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Chair Crall on January 11, 2019, at approximately 9:30 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky.

Board Personnel Present:

Brian J. Crall, Chair
Mark O. Haines, Vice Chair
Beverly H. Griffith, Member
William J. Byrley, Member
Catherine J. Monteiro, Member
Richard M. Waite II, Member
Tanya Lawrence, Member
Mark A. Sipek, Executive Director and Secretary
Stafford Easterling, General Counsel
Cynthia Perkins, Administrative Section Supervisor
Gwen McDonald, Administrative Specialist

Swearing in of newly appointed Board member, Tanya Lawrence.

The first order of business was to swear in the newest Merit Employee Board Member, Ms. Tanya Lawrence, who was appointed by the Board to fill the vacancy created when Ms. Heather Wagers resigned her Board position to accept a non-merit position. General Counsel Stafford Easterling administered the oath of office. [Ms. Lawrence will serve the remainder of Ms. Wagers' four-year term, which expires on June 30, 2022.]

2. READING OF THE MINUTES OF THE REGULAR MEETING HELD DECEMBER 14, 2018.

The minutes of the last Board meeting had been previously circulated among the members. Chair Crall asked for additions or corrections. Mr. Waite moved to approve the minutes as submitted. Ms. Griffith seconded and the motion carried 6-0. The Board members signed the minutes.

(Chair Crall does not vote, unless noted.)

3. EXECUTIVE DIRECTOR AND SECRETARY'S REPORT

Mr. Sipek welcomed Ms. Lawrence back to the Board.

Mr. Sipek briefly discussed the 2018-2019 Fiscal Year budget as of December 2018/January 2019, a little more than halfway through the year, the Board has only spent

approximately 43% of our budget. He pointed out that most of the spending has gone to personnel costs, with operating expenses being on track for the year. Chair Crall noted he had asked about the status of our budget at the December 2018 meeting due, in part, to the additional amount of budgeted resources spent on investigations in the past year. He also noted that the Board was criticized in a recent letter by counsel for the State Board of Elections (SBE) for wasting money on that investigation. Chair Crall wanted the record to clearly reflect that the Board is not wasting money; and the budget is in good shape. The operations of the Personnel Board are sound, and the Board is doing what it is chartered to do.

Mr. Sipek reported that the Annual Report for Fiscal Year 2018 will be presented next month. This report was delayed due to the tardy submission of grievance numbers by certain state agencies.

4. REPORT OF THE PERSONNEL CABINET

Secretary Thomas Stephens, General Counsel Rosemary Holbrook, and Commissioner Mary Elizabeth Bailey were present for the Personnel Cabinet.

Secretary Stephens congratulated Ms. Lawrence on her appointment to the Board.

Ms. Holbrook stated that some agencies had previously expressed that some job specifications were too rigid regarding the work experience and education categories. In an attempt to improve this, the Personnel Cabinet introduced a "career opportunities" category to capture and award credit for requisite skills and abilities learned by an applicant. This "on the job" credit could then provide needed flexibility to help applicants for state employment to meet the minimum qualifications necessary for a position, even if they otherwise fail to meet the posted requirements. The Personnel Cabinet implemented this change in July 2018, and monitored the process to see how it would be put into practice. The new requisite skills description proved difficult for the agencies to implement; it became burdensome for both agencies and Cabinet staff. The Personnel Cabinet decided the old system was better because the agencies preferred the Cabinet determining whether applicants met the education/experience requirements. The Cabinet has decided to return to the previous system beginning February 1, 2019. Chair Crall questioned how this problem will be addressed in the future. Ms. Holbrook said the Cabinet is "back to the drawing board" to review options to correct the problem.

Commissioner Bailey added that the Cabinet reviewed two other changes to the experience requirement. The Cabinet loosened their standards for determining what qualifies as a month of experience. Also, if an applicant had a part-time job in addition to a fulltime job, the applicant is awarded credit for the part-time work experience in addition to the experience gained in the fulltime job. This has allowed a number of additional applicants to apply for positions that they would have been previously ineligible.

Chair Crall asked Secretary Stephens to discuss any updates to pension reform and the current retirement trends. Secretary Stephens replied that he had just received a report that week from the Kentucky Retirement Systems that everything has leveled out now, and is comparable to what you would expect on an annualized basis. Technology has changed a lot of what is done currently.

Secretary Stephens also noted he and Deputy Secretary Lesley Bilby attended the sentencing of James "Sully" Sullivan, who was convicted of bribery of a public official.

On the legislative front, Secretary Stephens stated that the Personnel Cabinet is considering the rebranding of Kentucky Deferred Compensation to describe its purpose – the official alternate retirement vehicle for state employees. The Cabinet is trying to come up with an automatic enrollment for employees during the onboarding process, as a best practice. There will also be a technical change in how the funds going into the program are processed.

Secretary Stephens also advised the Personnel Cabinet has hired a new Public Information Officer (PIO), Katherine North, who previously served as a television newscaster in Louisville.

Lastly, Secretary Stephens informed the Board that, in the future, he and other public officials will be hosting some training to discuss Cabinet programs, particularly on the managerial level. He opined that the Board, specifically Mr. Sipek and/or Mr. Easterling might want to address some groups as well.

Mr. Haines asked if the word "complementary" would be more accurate instead of the word "alternate," referring to KDC. Secretary Stephens agreed.

5. **ORAL ARGUMENTS - none**

6. **CLOSED SESSION**

Ms. Monteiro moved that the Board go into Executive Session for the purposes of discussing complaints and deliberations regarding individual adjudications. Mr. Waite seconded. Chair Crall stated that the motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. [Pursuant to KRS 61.810(1)(c), (j) and (k), the Kentucky Open Meetings Act, the Board will now retire into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action are as follows, because there will be discussion of proposed or pending litigation against or on behalf of the Board; specifically, *Finance and Administration Cabinet v. Kellie Lang and Personnel Board*; and deliberations regarding individual adjudications as listed on the Board's Agenda for today's meeting.]

This closed session will also consider matters mandated by KRS 11A.080 and KRS 11A.110(1) to be kept confidential, which comports with the exception found in KRS 61.810(1)(k). (9:50 a.m.)

Mr. Waite moved to return to open session. Ms. Monteiro seconded and the motion passed by acclamation. (10:39 a.m.)

7. CASES TO BE DECIDED

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments, where applicable.

A. Lindsey Pierce (16-129), et al. v. Kentucky State Police & Personnel Cabinet (66 appeals)

Ms. Griffith, having considered the record, moved to accept the recommended order dismissing the appeals, with clerical corrections. Ms. Monteiro seconded and the motion carried 4-1, with Ms. Lawrence abstaining. Mr. Waite opposed the motion.

B. Angela Rogers v. Justice and Public Safety Cabinet/Corrections (2018-038 and 2018-053) (2 appeals)

Mr. Haines, having considered the record, moved to accept the recommend order dismissing the appeals. Ms. Lawrence seconded and the motion carried 6-0.

8. WITHDRAWALS

Ms. Monteiro moved to accept the following withdrawals *en bloc* and to dismiss the appeals. Mr. Waite seconded and the motion carried 6-0.

- A. Missy Davis v. Public Protection Cabinet (2018-119)
- B. Joella Kendall v. Cabinet for Health and Family Services and Personnel Cabinet (2018-205)
- C. Allen Kestner v. Department of Parks (2018-194)
- D. Vanessa Suffoletta v. Department of Corrections (2018-218)
- E. Tamara Thompson v. Transportation Cabinet & Michael Hollinsworth (2016-307)
- F. Kristine Whitehill v. Department of Corrections (2018-157)
- G. Mary Tansey v. Cabinet for Health and Family Services (2018-213)

9. **SETTLEMENTS**

Ms. Griffith moved to issue settlement orders and to sustain the appeals *en bloc* to the extent set forth in the settlements as submitted by the parties. Mr. Waite seconded and the motion carried 6-0.

- A. Roy Allen v. Transportation Cabinet (2018-162)
- B. Kimber Craddock v. Department of Corrections (2017-243)
- C. Cynthia Gilmore v. Department of Corrections (2018-209 & 2018-212)
(2 appeals)
- D. Stephen Pennington v. Department of Corrections (2018-022)

10. **OTHER**

Both Mr. Haines and Mr. Byrley advised they would not be here for the Board meeting in February.

Mr. Waite questioned whether the Board would be photographed in March. Mr. Sipek stated he would advise the Board at the February meeting.


There being no further business, Mr. Waite moved to adjourn, Ms. Lawrence seconded, and the motion passed by acclamation. (10:45 a.m.)



Brian J. Crall, Chair



Mark O. Haines, Vice Chair




Beverly H. Griffith, Member



William J. Byrley, Member



Catherine J. Monteiro, Member



Richard M. Waite II, Member



Tanya Lawrence, Member

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD**

LINDSEY PIERCE (Appeal No. 2016-129)
TRACY TURNER (Appeal No. 2016-131)
MICHAEL LITTLE (Appeal No. 2016-133)
BELINDA LITTRELL (Appeal No. 2016-134)
ALEXIS MCGEE (Appeal No. 2016-135)
DANIEL RENDLEMAN (Appeal No. 2016-136)
PEGGY ZACHRITZ (Appeal No. 2016-137)
KIMBERLY LEWIS (Appeal No. 2016-140)
EMILY CRIDER (Appeal No. 2016-143)
NICOLE MANN (Appeal No. 2016-144)
DYLAN GREER (Appeal No. 2016-148)
DIEDRA MAYFIELD (Appeal No. 2016-149)
CHRISTY BASHAM (Appeal No. 2016-153)
DEANA OWENS (Appeal No. 2016-154)
KIMBERLY CRASE (Appeal No. 2016-156)
MELISSA ALLEN (Appeal No. 2016-158)
JOHN MCDOWELL (Appeal No. 2016-161)
PENNY MCDOWELL (Appeal No. 2016-162)
SARAH AKERS (Appeal No. 2016-172)
LISA ANGEL (Appeal No. 2016-173)
DEREK BAKER (Appeal No. 2016-174)
JESSICA BEVERLY (Appeal No. 2016-176)
ROBERT BROCK (Appeal No. 2016-177)
BRIAN BULLOCK (Appeal No. 2016-178)
BILLIE CORNET (Appeal No. 2016-179)
DEBBIE CRAVEN (Appeal No. 2016-180)
CHARLES DILLON (Appeal No. 2016-181)
JUSTIN FARLEY (Appeal No. 2016-182)
KRISTOPHER GILLIAM (Appeal No. 2016-183)
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SANDRA HART (Appeal No. 2016-186)
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CHRISTY WAHL (Appeal No. 2016-199)
HOUSTON WHITE (Appeal No. 2016-200)

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JENNIFER YOUNT (Appeal No. 2016-203)
CAMMIE BEASLEY (Appeal No. 2016-206)
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TIMOTHY MACKIN, JR. (Appeal No. 2016-227)
GINGER HUNT (Appeal No. 2016-231)
ERIC ROBINSON (Appeal No. 2016-234)
AMANDA SILER (Appeal No. 2016-252)

APPELLANTS

FINAL ORDER
SUSTAINING HEARING OFFICER'S
VS. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER AS ALTERED

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF STATE POLICE
And
PERSONNEL CABINET

APPELLEE

INTERVENOR

*** **

The Board, at its regular January 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 6, 2018, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** Conclusion of Law C (2) and (3) and substitute the following:

2. Appellees contend that Appellants' Equal Protection claim does not apply in the public employment context. They further argue that a U.S. Supreme Court case, *Enquist v. Oregon Department of Agr.*, 553 U.S. 591 (2008) dictates a finding that Appellants' claim is legally deficient and must be dismissed as a matter of law. In the *Enquist* case, the central issue before the United Supreme Court was "whether a public employee can state a claim under the Equal Protection Clause by alleging that she was arbitrarily treated differently from similarly situated employees, with no assertion that the different treatment was based on the employee's membership in any particular class." *Id.* at 594. Appellees interpret the *Enquist* decision as disallowing "class of one" allegations against public employers.

3. The Hearing Officer finds that the case of *Enquist v. Oregon Dept. of Agr.*, does, in fact, mandate the dismissal of Appellants' Equal Protection claim.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, be and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order, and the Appellants' appeals are **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 14th day of January, 2019.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:
Hon. David Broderick
Hon. Brandon Murley
Hon. Heather Wagers
Hon. Rosemary Holbrook
Lt. Col. Chad White
Ms. Amanda Cloyd

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD**

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APPELLANTS

V. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF STATE POLICE

APPELLEE

And

PERSONNEL CABINET

INTERVENOR

** **

These matters came on for a pre-hearing conference on November 9, 2017, at 10:00 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellants were not present in person, however, they were represented by the Hon. Kate Payton, who appeared by telephone. The Appellee, Justice and Public Safety Cabinet, Department of Kentucky State Police, was present and represented by the Hon. Heather Wagers

and Ms. Amanda Cloyd. The Appellee/Intervenor, Personnel Cabinet, was present and represented by the Hon. Rosemary Holbrook.

The purposes of the pre-hearing conference were to discuss the status of the appeals, address any other matters relating to the appeals and to schedule an evidentiary hearing, if appropriate.

The parties agreed that since the last pre-hearing conference, the *Scott* case before the Kentucky Supreme Court is now final. Counsel for the Appellees indicated they would like to file dispositive motions. They anticipated making arguments that the appeals were outside of the statute of limitations and possibly other arguments. Counsel for the Appellants stated that she would like to obtain affidavits from her clients regarding facts relevant to this issue. The parties also left open the possibility of discovery.

The Appellee and Intervenor filed a Joint Motion to Dismiss on March 29, 2018. The Appellants filed a response on April 30, 2018. The Appellee and Intervenor filed a joint reply on May 14, 2018.

This matter is now before the Hon. Colleen Beach, Hearing Officer, for a ruling on Appellees' Joint Motion to Dismiss.

Appellants, Lindsey Pierce, Tracy Turner, Michael Little, Belinda Littrell, Alexis McGee, Daniel Rendleman, Peggy Zachritz, Kimberly Lewis, Emily Crider, Nicole Mann, Dylan Greer, Diedra Mayfield, Christy Basham, Deana Owens, Kimberly Crase, Melissa Allen, John McDowell, Penny McDowell, Sarah Akers, Lisa Angel, Derek Baker, Jessica Beverly, Robert Brock, Brian Bullock, Billie Cornet, Debbie Craven, Charles Dillon, Justin Farley, Kristopher Gilliam, Ashely Gore, Sandra Hart, Joe Jones, Michael Little, Twalla Long, Kim Newsome, Charles Owens, Mary Pierce, Christopher Rogers, Jerri Scott, Tandra Sheridan, Dennis Tegethoff, Christy Wahl, Houston White, Winston Wilson, Jr., Jennifer Yount, Cammie Beasley, Tony Cornwell, Eric Smith, Michael Williams, Nita Franklin, Joseph Mattingly, James Paris, Lauren Russell, Jodi Shacklette, Charles Stewart, Jr., Bridget Stone, Corey Wright, Michelle Baker, Martha Davenport, Faith Farley, Richard Jones, Allyson Tatman, Timothy Mackin, Jr., Ginger Hunt, Eric Robinson, and Amanda Siler, are represented by the Hon. David Broderick and the Hon. Brandon Murley. Appellee, Justice and Public Safety Cabinet, Department of State Police, is represented by the Hon. Heather Wagers. Intervenor, Personnel Cabinet, is represented by the Hon. Rosemary Holbrook.

BACKGROUND

1. Appellants are currently employed by the Justice and Public Safety Cabinet, Kentucky State Police (with the exception of Faith Farley who terminated her employment). All Appellants are Telecommunicators, and are stationed in eleven different posts. (**Hearing Officer Note:** Tracy Turner, Peggy Zachritz, Kimberly Lewis, and Sarah Akers have retired; Eric Robinson has terminated his employment also – see Joint Motion to Dismiss.) These

consolidated appeals were filed, separately, on various dates ranging from July 11, 2016, through September 14, 2016.

2. Appellants allege that Appellee Cabinet has violated Appellant's right to Equal Protection, afforded them by the United States Constitution and Sections 1, 2, and 3 of the Kentucky Constitution. Appellants maintain that there is no rational basis for the disparity in pay between Appellants and other similarly-situated Telecommunicators. Some of the Appellants also claim they have been improperly denied lunch and rest breaks, in violation of KRS 337.355 and KRS 337.365. In terms of relief, Appellants request back pay to compensate them for the unequal salaries. With respect to lunch periods and rest breaks, they request that they be afforded such breaks in the future. (More Definite Statement on Behalf of Appellants).

3. By Interim Order dated November 29, 2016, all the appeals were consolidated and the Personnel Cabinet's Petition for Intervention was granted.

4. Appellee Justice and Public Safety Cabinet and Intervenor Personnel Cabinet filed a Joint Motion to Dismiss on March 29, 2018. In their motion, the Cabinets assert that the Personnel Board lacks jurisdiction to consider the issues raised by Appellants as (1) the grounds for the appeal are moot, (2) the appeals fail to state a claim upon which the Personnel Board may grant relief, as there is no legal basis for Appellants' pay rate claims, (3) the appeals are untimely, and (4) the Board does not have jurisdiction over KRS Chapter 337 claims.

5. Appellants filed a Response and Objection to the Joint Motion to Dismiss on April 30, 2018. In their response, Appellants assert that their Equal Protection claim is based on the Kentucky Constitution and, therefore, their claims are based on state law. As for their KRS Chapter 337 claims, the affected Appellants assert that violation of those statutes are penalizations as defined in KRS 18A.005(24), and that the statute requires employees to "exhaust administrative remedies with the Personnel Board." Appellants also contend that because Appellees attached a document, a Personnel Action Notification (PAN), to their motion, that the proper standard for review in this instance is that of a Motion for Summary Judgment, pursuant to CR 12.02 and CR 12.03.

FINDINGS OF FACT

Largely accepting the facts as set out by the parties, the Hearing Officer will analyze these appeals using the relevant factual background as set out below:

1. At the time of the submission of their appeals, the Appellants were all classified employees with status, serving as Telecommunicators with the Kentucky State Police. Their work stations are located across eleven different posts.

2. Telecommunicators at KSP do not all earn the same salary. Some Telecommunicators earn more than Appellants. Appellants reference the salary of an individual employee, Tiffany Fields (no longer employed), as illustrative of the arbitrary pay disparity among Telecommunicators.

3. Appellants filed the instant action arguing that there is no rational basis for this disparity in pay.

4. There are no allegations that the disparity in pay among Telecommunicators are the result of discrimination based on protected class status, such as race or gender, in violation of KRS Chapter 344 or KRS 18A.140(1).

5. Some of the Appellants assert that they have been denied rest and lunch breaks in violation of KRS Chapter 337.

6. There are no allegations of violations of the salary adjustment regulation, 101 KAR 2:034, Section 1(2).

7. The Cabinets, in their Joint Motion to Dismiss, attached a document, Personnel Action Notification, which became a part of the record in this appeal.

8. KRS 337.355 states:

Employers, except those subject to the Federal Railway Labor Act, shall grant their employees a reasonable period for lunch, and such time shall be as close to the middle of the employee's scheduled work shift as possible. In no case shall an employee be required to take a lunch period sooner than three (3) hours after his work shift commences, nor more than five (5) hours from the time his work shift commences. This section shall not be construed to negate any provision of a collective bargaining agreement or mutual agreement between the employee and employer.

9. KRS 337.365 states:

No employer shall require any employee to work without a rest period of at least ten (10) minutes during each four (4) hours worked, except those employees who are under the Federal Railway Labor Act. This shall be in addition to the regularly scheduled lunch period. No reduction in compensation shall be made for hourly or salaried employees.

10. KRS 337.385 states:

1. Except as provided in subsection (3) of this section, any employer who pays any employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of such wages and overtime compensation, less any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages, and for costs and such reasonable attorney's fees as may be allowed by the court.

2. If, in any action commenced to recover such unpaid wages or liquidated damages, the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he or she had reasonable grounds for believing that his or her act or omission was not a violation of KRS 337.020 to 337.285, the court may, in its sound discretion, award no liquidated damages, or award any amount thereof not to exceed the amount specified in this section. Any agreement between such employee and the employer to work for less than the applicable wage rate shall be no defense to such action. Such action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself, herself, or themselves.
 3. If the court finds that the employer has subjected the employee to forced labor or services as defined in KRS 529.010, the court shall award the employee punitive damages not less than three (3) times the full amount of the wages and overtime compensation due, less any amount actually paid to such employee by the employer, and for costs and such reasonable attorney's fees as may be allowed by the court, including interest thereon.
 4. At the written request of any employee paid less than the amount to which he or she is entitled under the provisions of KRS 337.020 to 337.285, the commissioner may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court. The commissioner in case of suit shall have power to join various claimants against the same employer in one (1) action.
11. Section 2 of the Kentucky Constitution provides:
- Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

CONCLUSIONS OF LAW

A. STANDARD OF REVIEW

1. Appellants assert that because the Cabinets attached an exhibit to their Joint Motion to Dismiss, their motion, pursuant to Civil Rule 56, is more properly decided under the Motion for Summary Judgment standard of review.

2. The Hearing Officer agrees that it is well-settled law that “reliance on matters outside the pleadings by the court effectively converts a motion to dismiss into a motion for summary judgment pursuant to CR 56 and CR 12.02.” *McCray v. City of Lake Louisville*, 332 S.W.2d 837 (Ky. Ct. App. 1960).

3. In the present appeal, the Cabinets attached a document (Personnel Action Notification) to their Joint Motion to Dismiss, which the Hearing Officer did not exclude. The technical effect of this submission by the Appellees is to convert their Joint Motion to Dismiss to a Motion for Summary Judgment pursuant to CR 12.02, which reads in part: “[i]f matters outside the pleading are presented to and not excluded by the court, the motion shall be as one for summary judgment.”

4. A Motion for Summary Judgment shall be granted when there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. (CR 56.03).

B. APPELLANTS’ KRS 337.335 AND KRS 337.365 CLAIMS

1. Some of the Appellants in the instant appeal claim that they have been penalized by the Appellee Justice Cabinet’s denial of certain lunch and rest breaks in violation of KRS 337.355 and KRS 337.365. These Appellants further assert that they are required to exhaust their administrative remedies with the Personnel Board before proceeding further with these claims.

2. KRS Chapter 337 establishes the requirement for employers to allow periodic rest breaks and lunch breaks. KRS 337.355 provides that employers shall grant their employees a reasonable period for lunch; KRS 337.365 provides that employers shall not require employees to work longer than four hours without a ten minute rest period.

3. The penalty section of KRS Chapter 337 is found at KRS 337.990, which allows for the imposition of civil penalties for violations of certain provisions of that chapter. Under KRS 337.990(10), “[a]ny employer who violates KRS 337.365 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).”

4. Other than the above statute, the sole remaining provision of KRS Chapter 337 that speaks directly to potential employer liability is KRS 337.385 (a statute relating to the recovery of unpaid wages and liquidated damages). That statute states clearly that it establishes a penalty for violation of section 337.020 to 337.285 only. (In fact, it references “337.020 to 337.285” three different times—no other sections of KRS Chapter 337 are mentioned). KRS 337.385 is clearly meant to solely address the consequences of an employer’s paying an employee fewer wages or overtime than they are entitled to.

5. No language in KRS 337.385 makes any reference to KRS 337.355 or KRS 337.365. The Hearing Officer finds, therefore, that KRS 337.385 does not establish a remedy for alleged violations of the lunch and rest break statutes. As the U.S. District Court for the Western District of Kentucky held in the case of *England v. Advance Stores Co., Inc.*, 263 F.R.D. 423, 434 (W.D.Ky. 2009), when KRS 337.385 "is read in conjunction with the earlier mentioned statute on civil penalties, KRS 337.990, it becomes clear that, at a minimum, the Kentucky Wages and Hours Act envisions that violations of KRS 337.355 and KRS 337.365 are to be handled administratively through the Office of Workplace Standards with employers being subject to a potential civil penalty of between \$ 100 and \$1,000 for any violations of either statute."

6. Two Personnel Board cases, *Larry Robertson, et al. v. Corrections Cabinet*, Appeal No. 1985-002, and *Raymond E. Schagene v. Justice Cabinet, Department of Corrections*, Appeal Nos. 1997-276 and 1997-294, are consistent with the ruling in *England*. In the *Robertson* appeal, three Appellants claimed they had been denied lunch breaks; the Board concluded that questions arising from KRS 337.355 "rests properly with the Kentucky Department of Labor and not with the Kentucky Personnel Board."

7. In the *Schagene* appeal, the Appellant claimed a penalization for being denied a rest break on two occasions; the Board concluded that "[r]equirements for granting of lunch periods and rest periods for employees are governed by the provisions of KRS 337.355 and KRS 337.365...The Personnel Board is without jurisdiction to enforce civil penalties under the provisions of KRS Chapter 337."

8. Finally, Appellants' reliance on *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354 (Ky. 2005) and *McCann v. Sullivan University*, 528 S.W.3d 331 (Ky. 2017) is misplaced. Appellants contend that the above two Personnel Board cases, decided many years prior, are "inconsistent" with the holdings in *Parts Depot* and *McCann*. The Hearing Officer finds that *Parts Depot* and *McCann* involved a claim for unpaid salary and wages only and, therefore, dealt with the interpretation of KRS 337.385. As discussed above, KRS 337.385 does not apply to the enforcement of KRS 337.355 or KRS 337.365, and consequently, these two cases have little probative value.

9. The Hearing Officer concludes that the Personnel Board is without jurisdiction to enforce penalties under the provisions of KRS 337.355 and KRS 337.365.

C. APPELLANTS' EQUAL PROTECTION CLAIM

1. Appellants claim that the Justice and Public Safety Cabinet has violated their rights to Equal Protection afforded them by the U.S. Constitution and Sections 1, 2, and 3 of the Kentucky Constitution. They maintain that there is no

rational basis for the disparity in pay between Appellants and some of their similarly situated coworkers. (Appellants' More Definite Statement).

2. Appellees contend that Appellants' Equal Protection claim does not apply in the public employment context. They further argue that a U.S. Supreme Court case, *Enquist v. Oregon Department of Agr.*, 553 U.S. 591 (2008) dictates a finding that Appellants' claim is legally deficient and must be dismissed as a matter of law. In the *Enquist* case, the central issue before the United Supreme Court was "whether a public employee can state a claim under the Equal Protection Clause by alleging that she was arbitrarily treated differently from similarly situated employees, with no assertion that the different treatment was based on the employee's membership in any particular class." *Id.* at 594. Appellees interpret the *Enquist* decision as disallowing "class of one" allegations against public employees.

3. The Hearing Officer finds that the case of *Enquist v. Oregon Dept. of Agr.*, does, in fact, mandate the dismissal of Appellants' Equal Protection claim.

4. In *Enquist*, the Plaintiff alleged she was penalized not because she was a member of a protected class (i.e., age, race, gender, religion, etc.) but for arbitrary, vindictive, and malicious reasons. Such a claim sounds in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and is known as a "class-of-one" claim.

5. It is well-settled law that Section 2 of the Kentucky Constitution is "broad enough to embrace both due process and equal protection of the laws, both fundamental fairness and impartiality." *Pritchett v. Marshall*, 375 S.W.2d 253, 258 (1963). Thus, the Appellants' arbitrariness claims against the Appellees sound in the Equal Protection Clause established by the Kentucky Constitution, making *Enquist* relevant to Kentucky state law claims.

6. The *Enquist* court acknowledged that a class of one equal protection clause claim can, in some circumstances, be sustained. Several cases, such as *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), recognize that principle. In *Olech*, the government singled out the plaintiff with regard to its regulation of property. The U.S. Supreme Court found the state's differential treatment of Olech raised a concern of arbitrary classification, which required the State to provide a rational basis for its action.

7. The *Enquist* court distinguished between the application of the Equal Protection clause when the government acts as sovereign, such as in *Olech*, and when it acts as an employer: "We have long held that there is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896, (1961). This distinction has been particularly

clear in our review of state action in the context of public employment. Thus, "the government as employer indeed has far broader powers than does the government as sovereign." *Id.* at 598.

8. The *Enquist* court concluded that "...the class-of-one theory of equal protection - which presupposes that like individuals should be treated alike, and that to treat them differently is to classify them in a way that must survive at least rationality review — is simply a poor fit in the public employment context. To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship." *Id.* at 605. Thus, the Equal Protection Clauses of neither the United States nor the Kentucky Constitution are implicated where "government employers are alleged to have made individualized, subjective personnel decisions in a seemingly arbitrary, irrational manner." *Id.*

9. Here, Appellants claim they were penalized because other employees earn higher salaries. This is the very situation the *Enquist* Court deemed to be "individualized, subjective personnel decisions" that do not raise equal protection concerns. The Hearing Officer notes that Appellants do not claim discrimination in violation of KRS Chapter 344 or KRS 18A.140(1). Nor do they claim a violation of the salary adjustment regulation, 101 KAR 2:034. The Hearing Officer concludes that, at the Personnel Board, such a claim is not recognizable under KRS Chapter 18A or Section 2 of the Kentucky Constitution.

10. This conclusion is supported by the Board's ruling in the case of *Scott Huddleston, et al. v. Transportation and Personnel Cabinets*, Appeal No. 2015-194.

11. Lastly, because it is not possible for the non-moving party, here the Appellants, to produce evidence at trial that would warrant a judgment in their favor regarding their alleged Equal Protection and KRS Chapter 337 claims, the Hearing Officer concludes there are no issues of material fact and that the Appellee, Justice and Public Safety Cabinet and the Intervenor, Personnel Cabinet, are entitled to judgment as a matter of law. In light of the foregoing conclusion, the Cabinets' assertion that Appellants' claims are time-barred is rendered moot.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of LINDSEY PIERCE (Appeal No. 2016-129), TRACY TURNER (Appeal No. 2016-131), MICHAEL LITTLE (Appeal No. 2016-133), BELINDA LITTRELL (Appeal No. 2016-134), ALEXIS MCGEE (Appeal No. 2016-135), DANIEL RENDLEMAN (Appeal No. 2016-136), PEGGY ZACHRITZ (Appeal No. 2016-137), KIMBERLY LEWIS (Appeal No. 2016-140), EMILY

CRIDER (Appeal No. 2016-143), NICOLE MANN (Appeal No. 2016-144), DYLAN GREER (Appeal No. 2016-148), DIEDRA MAYFIELD (Appeal No. 2016-149), CHRISTY BASHAM (Appeal No. 2016-153), DEANA OWENS (Appeal No. 2016-154), KIMBERLY CRASE (Appeal No. 2016-156), MELISSA ALLEN (Appeal No. 2016-158), JOHN MCDOWELL (Appeal No. 2016-161), PENNY MCDOWELL (Appeal No. 2016-162), SARAH AKERS (Appeal No. 2016-172), LISA ANGEL (Appeal No. 2016-173), DEREK BAKER (Appeal No. 2016-174), JESSICA BEVERLY (Appeal No. 2016-176), ROBERT BROCK (Appeal No. 2016-177), BRIAN BULLOCK (Appeal No. 2016-178), BILLIE CORNET (Appeal No. 2016-179), DEBBIE CRAVEN (Appeal No. 2016-180), CHARLES DILLON (Appeal No. 2016-181), JUSTIN FARLEY (Appeal No. 2016-182), KRISTOPHER GILLIAM (Appeal No. 2016-183), ASHELY GORE (Appeal No. 2016-184), SANDRA HART (Appeal No. 2016-186), JOE JONES (Appeal No. 2016-187), MICHAEL LITTLE (Appeal No. 2016-188), TWALLA LONG (Appeal No. 2016-189), KIM NEWSOME (Appeal No. 2016-191), CHARLES OWENS (Appeal No. 2016-192), MARY PIERCE (Appeal No. 2016-193), CHRISTOPHER ROGERS (Appeal No. 2016-195), JERRI SCOTT (Appeal No. 2016-196), TAMBRA SHERIDAN (Appeal No. 2016-197), DENNIS TEGETHOFF (Appeal No. 2016-198), CHRISTY WAHL (Appeal No. 2016-199), HOUSTON WHITE (Appeal No. 2016-200), WINSTON WILSON, JR. (Appeal No. 2016-201), JENNIFER YOUNT (Appeal No. 2016-203), CAMMIE BEASLEY (Appeal No. 2016-206), TONY CORNWELL (Appeal No. 2016-207), ERIC SMITH (Appeal No. 2016-208), MICHAEL WILLIAMS (Appeal No. 2016-209), NITA FRANKLIN (Appeal No. 2016-210), JOSEPH MATTINGLY (Appeal No. 2016-211), JAMES PARIS (Appeal No. 2016-212), LAUREN RUSSELL (Appeal No. 2016-213), JODI SHACKLETTE (Appeal No. 2016-214), CHARLES STEWART, JR. (Appeal No. 2016-215), BRIDGET STONE (Appeal No. 2016-216), COREY WRIGHT (Appeal No. 2016-218), MICHELLE BAKER (Appeal No. 2016-219), MARTHA DAVENPORT (Appeal No. 2016-220), FAITH FARLEY (Appeal No. 2016-222), RICHARD JONES (Appeal No. 2016-223), ALLYSON TATMAN (Appeal No. 2016-225), TIMOTHY MACKIN, JR. (Appeal No. 2016-227), GINGER HUNT (Appeal No. 2016-231), ERIC ROBINSON (Appeal No. 2016-234), and AMANDA SILER (Appeal No. 2016-252) V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF STATE POLICE, AND PERSONNEL CABINET be DISMISSED.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Colleen Beach** this 16th day of December, 2018.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. David Broderick
Hon. Brandon Murley
Hon. Heather Wagers
Hon. Rosemary Holbrook
Hon. Greg Ladd